

A Zedcomas Sdn Bhd & Ors v MBf Finance Bhd

B HIGH COURT (MIRI) — CIVIL APPEAL NO 12–04 OF 2002(MR)
DAVID WONG J
12 MAY 2008

C *Hire Purchase — Hire purchase agreement — Default in payment — Appellant/defendant defaulted on payment — Whether calculation method adopted by respondent correct — Whether amount claimed as damages reasonable and proper*

D The respondent/plaintiff and the appellant/first defendant entered into a hire purchase agreement on 5 November 1996 ('the HP agreement'). The cause of action was as against the appellant for its breach of the HP agreement as the hirer of one unit of Isuzu truck ('the truck'). The second to fifth appellants were sued as guarantors of the first appellant. The first appellant had defaulted on payment of the monthly instalments, to which the respondent had terminated the HP agreement and claimed for damages suffered. The truck was returned by the first appellant to the respondent who claimed RM38,160 together with interest and RM36,019.99 together with penalty interest and costs. The appellants disputed this and counterclaimed for RM19,220.66 which included, inter alia, one half of the total amount of hiring. This was allowed by the sessions court judge in a summary judgment. The appellant appealed. The respondent relying on *Liaw Swee Seng & Anor v MBf Finance Bhd* [2001] 4 AMR 4463 and *MBf Finance v Homedaco Development Sdn Bhd & 2 Ors* (Kota Kinabalu High Court Originating Summons No K24–31 of 1999, unreported) which also dealt with hire purchase agreements containing similar clauses, on calculation of compensation contended that the appellant's contention was wrong.

H **Held**, dismissing the appeal with costs:

I (1) The following could be claimed under cl 7: the costs of putting the said goods into good repair, overdue rentals, any other sums due under the HP agreement and compensation for depreciation. However, the court disagreed with the two cases' views as to how the amount of compensation should be calculated (see paras 10–12); *Liaw Swee Seng & Anor v MBf Finance Bhd* [2001] 4 AMR 4463 and *MBf Finance v Homedaco Development Sdn Bhd & 2 Ors* (Kota Kinabalu High Court Originating Summons No K24–31 of 1999, unreported) not followed.

- (2) In the interpretation of contracts, the words of the written instrument must be construed according to their natural meaning, and if they are plain and unambiguous it must be construed according to the plain and unambiguous language of the instrument itself. Where a document contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution. In cases where it is impossible to make any sense of the relevant words, the court should ignore them or treat them as not part of the contract (see para 15). A
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- (3) The words used in cl 7 in defining what the depreciation amount was did not make any sense. There was no meeting of minds as to how the amount of depreciation was to be worked out and to invent a formula would be rewriting a term of the HP agreement. In the circumstance, the claim for depreciation provided for in cl 7 was ignored. This interpretation did not help the appellants. Clause 7 allowed the respondent to claim whatever sums due under the HP agreement and cl 5 allowed the respondent to claim for loss and damages suffered as a result of the first appellant's breach of the HP agreement. The appellants had not shown or rebutted why the formula used to calculate the loss and damages was wrong or unreasonable. The amount claimed as loss and damages was reasonable and proper (see paras 17–20). C
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[Bahasa Malaysia summary]

Responden/plaintif dan perayu/defendan pertama telah memasuki perjanjian sewa beli pada 5 November 1996 ('perjanjian SB'). Kausa tindakan adalah terhadap perayu kerana pelanggaran perjanjian SB itu sebagai penyewa satu unit lori Isuzu ('lori tersebut'). Perayu-perayu kedua hingga kelima telah disaman sebagai penjamin-penjamin perayu pertama. Perayu pertama telah gagal membuat bayaran ansuran bulanan, yang mana responden telah menamatkan perjanjian SB itu dan menuntut ganti rugi yang dialami. Lori tersebut telah dipulangkan oleh perayu pertama kepada responden yang menuntut RM38,160 bersama faedah dan RM36,019.99 bersama penalti faedah dan kos. Perayu-perayu telah mempertikaikan ini dan telah menuntut balas untuk RM19,220.66 yang termasuk, antara lain, separuh daripada jumlah keseluruhan sewaan. Ini telah dibenarkan oleh hakim mahkamah sesyen dalam penghakiman terus. Perayu telah merayu. Responden yang bergantung atas kes *Liaw Swee Seng & Anor v MBf Finance Bhd* [2001] 4 AMR 4463 dan *MBf Finance v Homedaco Development Sdn Bhd & 2 Ors* (Kota Kinabalu High Court Originating Summons No K24–31 of 1999, unreported) yang juga membincangkan tentang perjanjian-perjanjian sewa beli yang mengandungi klausa-klausa sama, atas pengiraan pampasan telah menegaskan bahawa hujah perayu adalah salah. F
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A Diputuskan, menolak rayuan dengan kos:

(1) Berikut boleh dituntut di bawah kl 7: kos-kos untuk menajga barangan dalam keadaan baik, sewa yang tertunggak, apa-apa jumlah lain di bawah perjanjian SB dan pampasan untuk susut nilai. Walau bagaimanapun, mahkamah tidak bersetuju dengan pendapat dua kes tersebut berhubung bagaimana jumlah pampasan patut dikira (lihat perenggan 10–12); *Liaw Swee Seng & Anor v MBf Finance Bhd* [2001] 4 AMR 4463 dan *MBf Finance v Homedaco Development Sdn Bhd & 2 Ors* (Kota Kinabalu High Court Originating Summons No K24–31 of 1999, unreported) tidak diikuti.

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(2) Dalam pentafsiran kontrak, perkataan dalam bahan bertulis hendaklah ditafsirkan menurut maksud lazimnya, dan jika ianya biasa dan jelas ia hendaklah ditafsirkan menurut bahasa yang biasa dan jelas tentang bahan itu sendiri. Di mana dokumen itu tidak jelas yang mana sebaliknya boleh diselesaikan, ia boleh ditafsirkan secara negatif kepada pihak yang memohonnya untuk disempurnakan. Dalam kes-kes di mana ia mustahil untuk memahami perkataan-perkataan berkaitan, mahkamah patut tidak mengendakkannya dan menganggap ianya bukan sebahagian kontrak (lihat perenggan 15).

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(3) Perkataan-perkataan yang digunakan dalam kl 7 untuk mentafsirkan jumlah susut nilai tidak diterima akal. Tiada pertembungan minda berhubung bagaimana jumlah susut nilai perlu dilaksanakan dan untuk mencipta formula adalah seperti menulis semula terma perjanjian SB. Dalam keadaan ini, tuntutan untuk susut nilai yang diperuntukkan dalam kl 7 tidak diendahkan. Pentafsiran ini tidak membantu perayu-perayu. Klausula 7 membenarkan responden menuntut apapun jumlah tertunggak di bawah perjanjian SB dan kl 5 membenarkan responden menuntut kerugian dan ganti rugi yang dialami akibat daripada pelanggaran perjanjian SB oleh perayu pertama. Perayu-perayu tidak menunjukkan atau mematahkan kenapa formula tersebut digunakan untuk mengira kerugian dan ganti rugi adalah salah. Jumlah yang dituntut untuk kerugian dan ganti rugi adalah munasabah dan wajar (lihat perenggan 17–20).]

H Notes

For a case on default in payment, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3883.

I Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)

Kandasami v Mohamed Mustapha [1983] 2 MLJ 85 (refd)

Liaw Swee Seng & Anor v MBf Finance Bhd [2001] 4 AMR 4463 (not folld)

MBf Finance v Homedaco Development Sdn Bhd & 2 Ors (Kota Kinabalu High Court Originating Summons No K24–31 of 1999, unreported) (not folld) A
North Eastern Railway Co v Hastings [1990] AC 260 (refd)
Vitol BV v Compagnie Europeenne des Petroles [1988] 1 Lloyd's Rep 574 (refd)

Majen Panyog (Padawan Majen & Co) for the appellants/defendants. B
Lawrence Lai (Awang Lai Sandhu & Co) for the respondents/plaintiffs.

David Wong J:

BRIEF FACTS OF APPEAL C

[1] The claim by the respondent/plaintiff ('respondent') was made pursuant to the hire purchase agreement dated 5 November 1996 ('the HP agreement'). As against the first defendant/appellant ('first appellant') the cause of action was based on its breach of the HP agreement as the hirer of one unit of Isuzu truck ('the truck'). As for the second, third, fourth and fifth defendants/appellants ('appellants') they were sued as guarantors of the first appellant's obligations under the guarantee of the HP agreement in writing dated 5 November 1996. D

[2] The first appellant defaulted in the payment of monthly instalments and as a result of that breach, the plaintiff terminated the HP agreement and claimed for the loss and damages suffered. E

[3] The first appellant on its own accord returned the truck to the respondent and was subsequently sold off by tender. F

[4] The respondent therefore, claims against the appellants jointly and severally: G

- (a) the sum of RM38,160 together with interest thereon at the rate of 12.68% per annum from 10 August 1999 until date of full payment;
- (b) the sum of RM36,019.99 together with penalty interest at 12.68% per annum accruing from 10 August 1999 until date of full payment; and H
- (c) costs of RM1,225.

[5] The appellants denied their liability and in fact submitted that the respondent in fact owed them the sum of RM19,220.66 which is calculated as follows: I

- (1) The respondent's claim as per cl 7 of the HP agreement is RM95,400 made up as follows:

A	<u>Particulars</u>	<u>RM</u>
	(a) Cost of repair	NIL
B	(b) Overdue rental (as at the date of termination of the Agreement by the Plaintiff)	NIL
	(c) Other sum payable under the Agreement	NIL
D	(d) One-half of the total amount of hiring (Total amount of hiring is RM190,800.00) One-half of the same is RM95,400.00	95,400.00
		95,400.00
C	Less	
	(a) initial deposit	RM45,895.00
D	(b) instalments paid	RM68,725.66
		RM114,620.66 (RM19,220.66)

The learned sessions court judge allowed a summary judgment application by the respondent on the amount claimed resulting in this appeal to this court.

[6] Having read the submissions from counsel's, it is my view that this appeal concerns only the interpretation of the cl 7 of the HP agreement ('cl 7') which reads as follows:

7 If the hiring be determined by the Hirer under paragraph 6 hereof or if the Owner terminates the hiring or repossesses the goods under paragraph 5 hereof the hirer shall pay to the Owner the estimated cost of putting the said goods into good repair and by way of compensation for depreciation in addition to all overdue rentals and any other sums payable hereunder such further sum as with the amount previously paid by way of rent (including the initial payment) shall equal one half of the total amount which would have been payable if the hiring had been continued for the full period of the Agreement.

[7] Mr Lawrence Lai, counsel for the respondent, submitted that the appellants' contention is wrong and relied on two cases, namely *Liaw Swee Seng & Anor v MBf Finance Bhd* [2001] 4 AMR 4463 ('*Liaw Swee Seng*') and *MBf Finance v Homedaco Development Sdn Bhd & 2 Ors* (Kota Kinabalu High Court Originating Summons No K24-31 of 1999, unreported) ('*Kota Kinabalu* case') which also dealt with a hire purchase agreement containing a similar cl 7 of the HP agreement in this appeal.

[8] In *Liaw Swee Seng's* case, the learned judge had this to say on cl 7:

With the aforesaid rules as guidance, I will now turn to consider the effect of the cl 5 and 7 of the said agreement. I find that the words and language of the said cl 5 is plain and unambiguous and does not give rise to any difficulty and arguments in the construction thereof. It provides with clarity the circumstances upon which the agreement may be terminated with a saving on the right of the owner to claim, upon termination, for arrears of hire purchase or damages in cases of breach by the hirer. On the contrary I found the language of cl 7 to be elusive and by no means easy to apprehend. As to the construction thereof, Mr. Sandhu submitted that the said clause comprises three elements of which the first two relate to damages in respect of 'the estimated cost of putting the goods into good repair' and 'compensation for depreciation', and the third providing for the method of calculation of 'compensation for depreciation'. Learned counsel contended that under the said cl 7 such 'compensation for depreciation' should be calculated in accordance with the following formula:

Compensation for Damages = 1/2 x total amount payable if hiring had continued to the full period

Less

- (1) *all overdue rental and any other sum payable; and*
- (2) *instalments/rental paid (including initial payments).*

Upon such construction, learned counsel concluded that the plaintiff's liability in respect of the breach of the hire purchase agreement is only limited to the sum under cl 7, and that such liability are limited only to costs of repair of the said goods and 'compensation for depreciation' to be calculated according to the aforesaid formula. With respect I cannot accept learned counsel conclusion as to the true effect of s 7. As to the second declaration, it is my humble view that the plaintiffs' liability under the said agreement is not only confined to the cost of putting the goods into good repair and compensation for depreciation as provided in cl 7 but also includes overdue rentals and other sums payable under the agreement. Such an interpretation is supported by the saving clause in cl 5 which provides that the termination of the agreement thereunder is without prejudice to the owner's claim for arrears of hire or damages for breach of agreement. The said cl 5 also provides for the additional liability of the first plaintiff to pay to the defendant the charges and costs in connection with the seizure of the goods and taking possession thereof thereunder. By reason thereof I find that the second declaration sought by the defendant is obviously unsustainable and without merit ...

In my view the plaintiffs' liability under the hire purchase agreement upon termination thereof in the case of breach by the plaintiffs shall be as follows:

- (a) the cost of putting the said goods into good repair; and

A (b) *the compensation for depreciation [which sum together with the amount previously paid by way of rent (including the initial payment) shall equal half of the total amount payable if hiring had continued to the full period.]*

B Plus (In Addition To)

(c) all overdue rentals
(d) any other sums payable under the agreement (including damages for breach and costs incurred in connection with the seizure and taking possession thereof).

C (Emphasis added.)

D [9] In the *Kota Kinabalu* case, the learned judge interpreted cl 7 in the following manner:

Following this contention, counsel for the defendant comes out with the following formula:

E *Compensation for depreciation equals:*

(a) *One half of the total amount payable if the hiring had been continued for the full period of the Agreement:*

less

F (b) *All overdue rentals and any other payments hereunder:*

(c) *Initial payment; and*

(d) *Any monthly instalments paid ...*

G Using this formula, I have done some calculation myself in respect of Agreement (a) ie Agreement No 2-1001-7-51965-4. The result of this mathematical calculation is minus RM50,014.

H Now, this is what I should call a senseless argument, and an absurdity of the first degree. Certainly, learned counsel for the defendant in his right sense would not expect this court to accept this kind of argument.

I It is submitted further that if the overdue rentals is meant to be paid over and above the two abovementioned payment then the expression 'all overdue rentals ...' should precede the words and expression that stipulate payment of compensation for depreciation.

With due respect, I must say that this line of contention is shallow and does not merit much consideration. Learned counsel for the defendant has been overly playing and dwelling with linguistic weakling in the making of the agreements. To my mind the arrangement of the words and expressions used in the agreement is

a matter of style in drafting, rather than derogation from the actual intention of the parties to the agreements.

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... It simply means that the defendant is obliged to make four types of payment namely (i) the estimated costs of putting the said goods into good repair, (ii) all monthly rentals that has fallen into arrears as the result of the defendant not meeting the monthly payment schedule, (iii) other sums payable under the agreement and (iv) compensation for depreciation in the value of the goods. *The formula for this item is that the plaintiff is entitled to one half of total amount payable under the agreement, less the initial payment and the total monthly rentals that has been paid according to the schedule.*

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(Emphasis added.)

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[10] From the above two cases, the two learned judges found that what can be claimed under cl 7 are these:

- (1) the costs of putting the said goods into good repair;
- (2) overdue rentals;
- (3) any other sums due under the HP agreement;
- (4) compensation for depreciation.

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[11] I am in agreement with the two Lordships' construction of cl 7 as to what can be claimed.

[12] However, with respect, I disagree with their views as to how the amount of compensation should be calculated. In *Liaw Swee Seng's* case, the learned judge merely restated the wordings in cl 7 which, with respect, do not give any formula. However the learned judge in the *Kota Kinabalu* case was more specific, which as stated earlier, was 'one half of the total amount payable under the agreement less the initial payment and the total paid monthly rentals'.

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[13] Having read the relevant part of cl 7 ('by way of compensation ... such further sum as with the amount previously paid by way of rent (including the initial payment) shall equal one half of the total amount which would have been payable if the hiring had been continued for the full period of the agreement') not less than five times, I with respect cannot see how the just quoted words dictate a formula as framed by His Lordship in the *Kota Kinabalu* case. If that was the intention of the parties, the wordings would have been framed in this manner: 'by way of compensation ... to be calculated by subtracting the total of the amount previously paid by way of rent (including the initial payment) from an amount equal to one half of the total amount which would have been payable if the hiring had been

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A continued for the full period of the agreement' or in the learned judge's words 'one half of the total amount payable under the agreement less the initial payment and the total paid monthly rentals'.

B [14] In the interpretation of contracts the words of the written instrument must be construed according to their natural meaning, and if they are plain and unambiguous it must be construed according to the plain and unambiguous language of the instrument itself (see *North Eastern Railway Co v Hastings* [1990] AC 260). Where a document contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution (see *Kandasami v Mohamed Mustapha* [1983] 2 MLJ 85). In cases where it is impossible to make any sense of the relevant words, the court should ignore them or treat them as not part of the contract. Authority for this proposition can be found in the case of *Vitol BV v Compagnie Europenne des Petroles* [1988] 1 Lloyd's Rep 574 at p 576 where Saville J said:

E The approach of the English law to the questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen the use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them — and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. *In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.*

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G (Emphasis added.)

H [15] The above passage was quoted with approval by Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754.

I [16] Reverting to the case at hand, I am of the view that the words used in cl 7 in defining what is the depreciation amount falls within the third category; and that is to say that the words in cl 7 do not make any sense at all. There was no meeting of minds as to how the amount of depreciation is to be worked out and to invent a formula would in my view be rewriting a term of the HP agreement. I am also surprised by the fact that the respondent had not taken steps to redraft cl 7 in a clear and distinct manner after the two cases mentioned by me.

[17] In the circumstance, I will ignore the claim for depreciation provided for in cl 7. A

[18] However my interpretation of cl 7 does not help the appellants. As stated earlier cl 7 allows the respondent to claim whatever sums due under the HP agreement and cl 5 allows the respondent to claim for loss and damages suffered as a result of the first appellant's breach of the HP agreement. The loss and damages claimed by the respondent is set out in cl 17 of the amended statement of claim dated 22 February 2000 which reads as follows: B

17 By reason of the matters aforesaid, in addition to the arrears of the instalment payments for the months of September 1998 to August 1999 in the sum of RM38,160, the plaintiff has suffered loss and damages in the sum of RM36,019.99 as particularised below: C

PARTICULARS

Total Hire Purchase Price	RM236,695.00	D
Less: Initial Payment	(RM 45,895.00)	
Instalments Paid	(RM 66,550.00)	
Arrears of Instalments	(RM 38,160.00)	
Balance Payable	RM 86,090.00	E
Less: Rebate of unearned interest	(RM 9,666.89)	
	RM 76,423.11	
Add: Interest calculated up to 9.8.1999	RM 3,540.98	
Other Costs	RM 1,055.90	
	RM 81,019.99	F
Less: Proceeds on sale of Goods on 9.8.1999	(RM 45,000.00)	
Loss and Damages	RM36,019.99	

The appellants had not shown or rebutted why the formula used to calculate the loss and damages is wrong or unreasonable. That being the case, I find that the amount claimed as loss and damages to be reasonable and proper. G

[19] Accordingly the appeal is dismissed with costs. H

Appeal dismissed with costs.

Reported by Chew Phye Ken I